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CIVIL TRIAL REFORM AND THE APPEARANCE OF FAIRNESS

PATRICK E. LONGAN*

I. INTRODUCTION

In his classic work on legal procedure and judicial administration, Richard Posner posits two criteria by which any civil justice system must be measured: the accuracy of its results and the costs of achieving those results.¹ The more accurate and efficient the system, the better it is. Since some procedures that might make the process more accurate would make it less efficient, and some efficient procedures sacrifice accuracy, the goal of reform is to achieve the optimum mix of accuracy and efficiency.²

There has been much concern in recent years about the accuracy of fact-finding by civil juries. Several courts in the late 1970s and early 1980s held that jury verdicts in complex civil cases are so unlikely to be accurate that to submit such cases to juries violates the Due Process Clause of the United States Constitution.³ More recent attention has been focused on how to adapt civil trial procedures to enable juries to reach more accurate results. Among the proposals are permission for jurors to ask questions,

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1. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973). Judge Posner prefaced his analysis as follows:

The purpose of legal procedure is conceived to be the minimization of the sum of two types of costs: "error costs" (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the "direct costs" (such as lawyers', judges', and litigants' time) of operating the legal dispute-resolution machinery.

Id. at 399-400. Judge Posner is not alone in his focus. See JOHN J. COUND ET AL., CIVIL PROCEDURE 3 (6th ed. 1993) ("There is but one test of a good system of procedure: Does it tend to the just and efficient determination of legal controversies?") (emphasis in original).

2. Posner, *supra* note 1, at 400.

3. *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (holding that there is an exception to the Seventh Amendment for complex cases); *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) (no such exception); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978) (trial court strikes jury demand if a new trial is necessary based upon juror testimony indicating the jury had little understanding of issues in the case). See also Richard Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 908 n.60 (1979); Rita Sutton, Note, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL. F. 575.

a provision for juror notebooks, interim arguments from the lawyers, and numerous other techniques.⁴ Each is designed to help the civil jury trial yield more accurate results.

Inefficiency in civil litigation also has received much recent attention. Congress, the courts, and others have taken steps to try to reduce what is perceived to be unacceptable delay and cost in processing civil cases from start to finish.⁵ More narrow concerns with efficiency focus on trial procedure and the perceived enormous waste of time in most trials.⁶ Proposals to reduce these inefficiencies run from imposing time limits on trials to strict judicial control over trials to increased use of technology.⁷ The hope is that changing the civil trial in these ways will make it more efficient without sacrificing accuracy.

Steps to improve accuracy and efficiency are crucial, and Judge Posner was correct twenty-three years ago when he started with the premise that accuracy and efficiency are two methods of assessing a civil justice system. But the framework is incomplete. Procedures must not only be accurate and efficient: they must also be perceived by the litigants as fair.⁸ The

4. See, e.g., Leonard B. Sand and Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (describing experiment regarding preinstructions for jurors, permitting juror questions, permitting juror note-taking, and furnishing written or tape recorded versions of the court's charge, among other techniques). See also Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT 181, 219-230 (Robert E. Litan, ed. 1993) (discussing procedural reforms for jury trials); Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in VERDICT 341 (Robert E. Litan ed., 1993) (same); H. Lee Sarokin and G. Thomas Munsterman, *Recent Innovations in Civil Jury Trial Procedures*, in VERDICT 378 (Robert E. Litan ed., 1993) (same); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580-96 (1990) [hereinafter Schwarzer, *Jury Trials*] (discussing alternative ways of instructing jurors, use of interim summations, juror note taking, juror questions and other procedural reforms).

5. For example, in 1990, Congress passed the Civil Justice Reform Act for the purpose of reducing inefficiencies in federal litigation associated with excessive costs and delays. 28 U.S.C. §§ 471-482 (1993). New Federal Rule of Civil Procedure 26(a)(1), which imposes a duty to disclose certain information at the beginning of a lawsuit without a request, has a similar purpose. See, e.g., William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE, Dec.-Jan., 1990, at 178.

6. The perception that trials are conducted inefficiently is pervasive. See, e.g., Patrick E. Longan, *The Shot Clock Comes To Trial: Time Limits For Federal Civil Trials*, 35 ARIZ. L. REV. 663, 696-703 (1993) [hereinafter Longan, *Shot Clock*] and sources cited therein.

7. *Id.* at 703-08.

8. The President of the American Bar Association recently expressed this point in connection with the proposal to abolish diversity jurisdiction in federal court where the plaintiff is a citizen of the state where the action is filed:

If I come into a state court on behalf of a corporation that is not a citizen of my home state but is doing business in my home state, I'll get the same level of justice,

United States Supreme Court has repeatedly held that procedures must "satisfy the appearance of justice."⁹ The legitimacy of any system of resolving civil disputes ultimately depends on the willingness of parties to abide by the results, and that willingness will be undermined by procedures that are perceived as unfair.¹⁰ In particular, trial procedures, and any reform of them, must be evaluated by the criterion of the appearance of fairness.

Civil trial procedure in the federal courts has undergone significant changes in the past decade, and in many ways those reforms have undermined the appearance of fairness. The purpose of this article is to identify when this has happened and to propose ways in which that appearance of fairness can be restored, without an enormous sacrifice of either efficiency or accuracy. It is time to consider the appearance of trial procedures to the litigants, before the lawyers and judges turn the trial into such an unsatisfactory event that the litigants emerge not only dissatisfied with the result—inevitably one party will be dissatisfied with the result—but also with the distinct impression that what just happened to them is illegitimate and unfair, and therefore the result should not be respected.

Part II of this Article discusses the need for perceived fairness and its components in order to provide a framework in which to evaluate particular trial procedures. Part III evaluates recent changes in the law of jury selection in federal court in light of these criteria and proposes specific ways in which the process can be changed to improve the appearance of

but I am not going to get the same *sense* of justice we have in the federal system.

....
This gets back to the sense of mystery I was talking about. One of the most important things about making a justice system work is that the parties believe they're being treated fairly. It's a little esoteric, but it is very real.

George E. Bushnell, Jr.: *Giving Voice to the Diverse Interests of the ABA*, THIRD BRANCH (Admin. Off. of the U.S. Cts., Wash., D.C.) Nov. 1994 at 10, 11. See also Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200-02 (1983) (describing how criminal procedures must create the appearance of respecting "fair process norms").

9. E.g., *Liljeberg v. Health Acquisition Servs. Corp.*, 486 U.S. 847, 864 (1988) (quoting *In Re Murchison*, 349 U.S. 133, 136 (1955); *Offut v. United States*, 348 U.S. 11, 14 (1945)).

10. Dean Wallace D. Loh stated this proposition as follows:

At trial, more is at stake than the truth of the matter in contest. Minimization of fact-finding errors is not necessarily the *summum bonum* of litigation. Evidence law also serves to advance goals extrinsic to truth determination. Rules that exclude hearsay not only ensure that admitted evidence is reliable but also make trials appear fairer. If litigants and the public perceive the dispute resolution process as impartial, they are more likely to accept the legitimacy of the outcome.

Wallace D. Loh, *The Evidence and Trial Procedure*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 15 (1985).

fairness. Part IV does the same with respect to recent changes regarding disqualification of trial judges and the role of trial judges in settling cases and managing trials.

In the quest for efficiency and accuracy, the sense of justice of the parties must not be lost. Trial procedures, and civil procedures generally, must also seek to preserve that appearance of fairness. This Article seeks to contribute to that effort.

II. THE PERCEPTION OF FAIRNESS AND ITS COMPONENTS

A. *The Need For Perceived Fairness*

One may legitimately ask why civil procedures should be designed around perception as well as reality. If the process is actually fair and reasonably efficient, why should we care how the process is perceived? The answer is, in part, a matter of political theory:

Political and legal theorists have generally agreed that government authorities can only function effectively when citizens support them enough to comply willingly with their directives. In the case of legal authorities, for example, it has been suggested that both the ability of the courts to influence the structure of law and the ability of the police and other government officials to enforce the law depend upon public satisfaction with, confidence in, and trust of legal authorities. The assumption that trust plays a key role in the authoritativeness of government, i.e., in the willingness of citizens to cooperate with government decisions and leaders, has been validated by research suggesting that a lack of public support leads to a willingness to disobey the law and to engage in anti-system behaviors such as riots.¹¹

It is, in other words, more difficult to govern without the respect of the governed, which derives in part from the appearance of the fairness of the processes employed by government.

11. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 51-52 (1984) (citations omitted). See also JOHN THIBAUT AND LAURENS WALKER, *PROCEDURAL JUSTICE* at 67 (1975):

It is also necessary to know how each of the possible procedural choices is perceived and evaluated by persons subject to the process and by other persons who may at some future time have their rights decided in a similar setting. This subjective measure is crucial because one of the major aims of the legal process is to resolve conflicts in such a way as to bind up the social fabric and encourage the continuation of productive exchange between individuals.

Id.

The point is not merely theoretical: it can become brutally real. A vivid example of the effect of a lack of faith in judicial process, albeit from a criminal context, comes from the Los Angeles riots that followed the state court acquittal of the officers who beat Rodney King: "[t]he discontent among many blacks that sets this city on edge has found a slogan, and it is emblazoned on red, black and green caps and T-shirts throughout South-Central Los Angeles: No Justice, No Peace."¹² Civil litigation processes that are perceived to be fair will discourage self-help and redirect disputes to more civilized resolutions.¹³

Other, less dramatic examples of deteriorating faith in the legal processes are present.¹⁴ A cottage industry of private judging has emerged to serve the judicial needs of those who can afford to pay for it and who do not trust the public judicial system.¹⁵ Parties who choose binding arbitration are also voting with their feet.¹⁶ In each case, those who opt out of the publicly-provided dispute resolution process are expressing dissatisfaction with it, albeit in a civilized way. As evidence of eroding faith in the judicial system, these developments bode ill for those who cannot afford a private peaceful substitute.

Since litigation at its most fundamental level is the civilized substitute for violence,¹⁷ it is crucial to ensure that it is a satisfactory substitute. Without attention to the perception of the fairness of the legal system, we risk disintegration and, ultimately, defiance. The appearance of fairness in our dispute resolution system is crucial because without it, the system itself becomes irrelevant. Like paper money, the results of the civil justice

12. Seth Mydans, *The Courts on Trial*, N.Y. TIMES, Apr. 8, 1993, at A14, quoted in Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 514.

13. See Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 241 (1966) (noting that one purpose of procedure is "tranquilizing disputants").

14. In addition to the developments mentioned in the text, it should be noted that some writers contend that the legal system itself has lost faith in its own procedures and turned to alternative dispute resolution as a panacea. E.g., Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need For a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

15. See generally, Helen I. Bendix and Richard Chernick, *Renting the Judge*, 21 LITIG. 33, Fall 1994, at 33.

16. Cf. 9 U.S.C. § 1 (1993) (the Federal Arbitration Act). See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (interpreting Federal Arbitration Act to cover age discrimination claim).

17. COUND, ET AL., *supra* note 1, at 3 ("[R]esort to law has replaced the resort to force that characterized primitive ages. . .").

system have worth precisely to the extent that citizens believe they have worth. The alternatives to the civil justice system are not palatable. We must identify what causes the system to be perceived as fair and strive to reinforce that perception.

B. *The Components of Perceived Fairness*

If the appearance of fairness is so central to the design of a civil justice system, then any reform of that system must be judged with appearances in mind. That judgment cannot occur, however, unless one identifies the elements of the appearance of fairness. Numerous studies have been undertaken to determine the type of dispute resolution system potential litigants would prefer. The subjects of these studies consistently choose the adversary system.¹⁸ The adversary system, in turn, derives its power to create the appearance of fairness from two premises: the existence of an impartial decision maker and party autonomy with respect to the presentation of the case.¹⁹

1. An Impartial Decision Maker

The first key to the appearance of fairness is that the litigant believes that all decision makers involved in the trial will be impartial.²⁰ The dependence of our system of justice on the appearance of the judge's impartiality is demonstrated by the numerous federal and state statutes and constitutional provisions that require a judge to recuse himself or herself or be disqualified if there is an appearance of partiality.²¹ Similarly, some

18. See Monroe H. Freedman, UNDERSTANDING LAWYERS' ETHICS 39-40 (1990), and sources cited therein (describing studies).

19. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (describing the fundamental premises of an adversary system); see also William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 706-712 (1989) [hereinafter Schwarzer, *Discovery Reform*] (discussing Fuller's premises in the context of modern litigation).

20. In one recent study, the sense of procedural fairness was linked most closely to the perception that the judge was unbiased. Tyler, *supra* note 11, at 51. See also LESLIE W. ABRAMSON, AMERICAN JUDICATURE SOC'Y, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT (2d ed. 1992) at vii ("Judicial impartiality is considered to be so important that even where a judge is in fact impartial but appears not to be, disqualification is required. Thus, we ask judges to faithfully maintain the appearance of impartiality as well as the reality of it.").

21. See Nancy F. Reynolds, Comment, *Why We Should Abolish Penalty Provisions for Compulsory Nonbinding Alternative Dispute Resolution*, 7 OHIO ST. J. OF DISPUTE RES. 173, 183 n.58 (1991) (listing state constitutional and statutory provisions relating to recusal and disqualification). See also, 28 U.S.C. § 455(a) (1994) (federal judges must be disqualified from any case in which their impartiality might reasonably be questioned).

circumstances require a potential juror to be excused regardless of the juror's actual ability to be fair.²² Regardless of the actual impartiality of the judge or jury, the process will be legitimate and the results acceptable only if that impartiality is unquestionable in the minds of the litigants.

2. Party Autonomy

The second component of the appearance of fairness is the need for party autonomy. Parties believe that processes that give them some control over their destinies are more fair. A series of psychological studies in the early 1970s focused on perceptions of fairness of various procedures.²³ One of the studies was conducted by John Thibaut, Laurens Walker, Stephen LaTour, and Pauline Holden.²⁴ Eighty-four subjects were given the facts of a hypothetical dispute but many were not told which litigant they would be. In this position, with some in ignorance of their own strategic interests,²⁵ the subjects were asked to choose among a number of different procedural systems for resolving the dispute. Those who knew which side they were on were also asked to choose. One of the choices was a description of the adversary system "in which the proceedings are chiefly controlled by the disputants through advocates who represent them in an openly biased way."²⁶ The clearest finding that emerged was that potential litigants, regardless of whether they knew which side was "theirs," believed that this adversary system with significant party autonomy was the fairest method of resolving disputes.²⁷ Another experiment resulted in the conclusion that the opportunity to present evidence "may be a common mediator of perceived fairness and satisfaction."²⁸ In another study, criminal defendants were asked an open-ended question: "What about the way your case was handled was fair or unfair?"²⁹ The most frequently mentioned factor was the opportunity to present evidence.³⁰

22. *E.g.*, *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir. 1971) ("That a stockholder in a company which is a party to a lawsuit is incompetent to sit as juror is so well settled as to be black letter law.").

23. *See generally* Thibaut and Walker, *supra* note 11, at Chapters 8, 9, and 11.

24. John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

25. The study followed the publication of JOHN RAWLS, *A THEORY OF JUSTICE* (1971), in which Rawls argued that "justice as fairness" requires that we judge all facets of society from behind a "veil of ignorance" about how that particular facet would affect us personally.

26. Thibaut, et al., *supra* note 24, at 1274-1275.

27. *Id.* at 1288.

28. Thibaut and Walker, *supra* note 11, at 96.

29. Tyler, *supra* note 11, at 67.

30. *Id.*

These experimental conclusions confirm what Professor Monroe Freedman has written, that "there is an idea of individual autonomy—that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways."³¹ Rules of procedure must respect this need. Judge Jack Weinstein has made the point in the context of the rules of evidence:

Generally, it would seem that most litigants feel more assurance with rules that allow free admissibility—and, therefore, with a less restrictive hearsay rule. A litigant who has been prevented from supporting his case, whatever the technical reason, is bound to feel dissatisfied. Allowing the introduction of evidence provides an opponent with little reason for feeling abused so long as he can tell his side of the story. As a general rule, then, allowing litigants to introduce hearsay relatively freely and to rely on hearsay, provided the opponent can call the declarant and otherwise attack him with a minimum of barriers, tends to tranquilize them.³²

Without the sense of control, litigants will not feel autonomous and will believe less in the fairness of the system. Those feelings will be exacerbated if it appears to them that the fact-finder is partial. How these perceptions are created in today's federal civil trial, and how they can be changed, are the subjects of the remainder of this Article.

III. PERCEPTIONS OF FAIRNESS AND JURY SELECTION

The first stage of the trial process is the selection of the jury. It is a crucial stage for the appearance of the fairness of the proceeding because any sense by the litigants that the process is flawed may be hard to correct. The analysis of how the civil trial, as conducted today, undermines the appearance of fairness must begin, therefore, with jury selection.

A. *Voir Dire*

Jury selection actually begins long before trial. The clerk must assemble the potential jurors for each trial by complying with a multi-step process that is governed by federal statute.³³ The first step for the litigants, however, is when they undertake to choose the particular jurors who will serve in their case. *Voir dire* is the process by which lawyers and

31. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 39 (1990).

32. Weinstein, *supra* note 13, at 246.

33. See 28 U.S.C. §§ 1861-1869 (1994) (statutory requirements for compiling juror lists and sending summons).

litigants obtain information about the potential jurors.³⁴ There are several aspects of the voir dire process, as it is conducted today, that may undermine the perception of the fairness of the trial.

1. Who Should Conduct the Voir Dire?

Historically, lawyers have conducted the voir dire questioning directly.³⁵ In federal civil cases, however, the usual practice today is that the court conducts the voir dire.³⁶ The rationale is that judges take less time than the lawyers.³⁷ In the name of efficiency, therefore, the parties through their lawyers are denied the opportunity to participate directly in the questioning of jurors.

This abbreviated judicial voir dire undermines both components of the appearance of fairness. First, the parties and lawyers learn less about the potential jurors. Judges cannot make the voir dire so limited that it is useless, but they do have great discretion about what to ask.³⁸ The court does not know as much about the case as the lawyers and thus is in an inferior position to ask the best questions to detect bias.³⁹ Because the court's interest is in saving time by an abbreviated voir dire, it has less of an incentive to delve deeply in voir dire.⁴⁰ Furthermore, "no one should understand the facts and nuances of a particular case better than the lawyers litigating it."⁴¹ The parties and their counsel justifiably have a greater fear that someone on the jury may be biased against them, and if

34. See, e.g., FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 9.93 (3d ed. 1984) (describing voir dire techniques).

35. J. Alexander Tanford, *An Introduction to Trial Law*, 51 MO. L. REV. 623, 628 (1986).

36. FED. R. CIV. P. 47(a). See also Sand & Reiss, *supra* note 4, at 427 (describing the predominant practice of judge voir dire in the federal courts).

37. Thomas A. Wiseman, Jr., *Lawyer Voir Dire*, 11 LITIG., Winter 1985, at 5. Judge Wiseman also noted that surveys showed that over 77% of trial judges permitted no lawyer voir dire in civil cases. *Id.*

38. See, e.g., *Art Press, Ltd. v. Western Printing Mach. Co.*, 791 F.2d 616, 618 (7th Cir. 1986) (trial court has "broad discretion in limiting the voir dire" but abused that discretion in this case); *Feitzer v. Ford Motor Co.*, 622 F.2d 281 (7th Cir. 1980) (same).

39. David Crump, *Peremptory Challenges After McDonough Equipment, Inc. v. Greenwood: A Problem of Fairness, Finality, and Falsehood*, 69 OR. L. REV. 741, 766 (1990).

40. *Id.* at 766. See also Robert G. Begam, *Who Should Conduct Voir Dire: The Attorneys*, 61 JUDICATURE 71 (1977); Arthur J. Stanley, *Who Should Conduct Voir Dire: The Judge*, 61 JUDICATURE 70 (1977). One lawyer described the problem in more colloquial terms when he said "It's a wham, bam, no thank you ma'am selection system." John Riley, *Voir Dire Debate Escalates over Lawyers' Participation*, NAT'L L.J., December 24, 1984, at 1 (quoting John J. Cleary, the former head of the San Diego public defender's office).

41. *Judge Patrick E. Higginbotham: Rules Changes Under Review*, THIRD BRANCH, Feb. 1995, at 11.

only the judge had allowed more questions, or allowed the lawyer to conduct the questioning, that bias would have come out. That fear of the unknown leads to the perception that the decision maker may not be impartial.

Second, the parties are not being permitted to participate, through their lawyer, in the jury selection process. Their sense of personal autonomy is undermined by the judicial monopoly on questioning.⁴² They may for their own reasons be very concerned about issues that the court believes are tangential. In one case, for example, the parties, but not the judge, were very concerned about the levels of education the jurors had obtained.⁴³ Even if the court believes their concern to be ill-founded, the parties will be less comfortable with the process if they are not permitted to ask what they believe to be relevant.

Judges resist lawyer participation in voir dire primarily in the name of efficiency. They can pick the jury much faster, the reasoning goes, so the lawyers should have to filter any concerns through the court. The court can then pick and choose what questions to ask. A recent study by the Federal Judicial Center concludes that an insignificant amount of time is saved when the judge selects the jury.⁴⁴ There is, however, a way to maintain the efficiency of judicial voir dire and yet improve the perception of the fairness of the process: the court can permit lawyer voir dire but simply limit the amount of time each lawyer has to conduct it. The parties, through their counsel, then are back in control. They are autonomous within the time allowed, and can choose for themselves what questions are most important to their decisions in jury selection.⁴⁵ A majority of the

42. Several years ago, Congress considered but did not pass a proposal, entitled the Civil Voir Dire Demonstration Act, to experiment with the reintroduction of lawyer-conducted voir dire in the federal courts. S. REP. NO. 143, 102nd Cong., 1st Sess. (1991). Similar proposals have been in Congress since at least 1984. Riley, *supra* note 40, at 1.

43. Art Press, Ltd., 791 F.2d at 618. The trial judge in that case was Judge Posner, sitting by designation. He refused to ask the questions about the jurors' education levels because he "did not 'want to make the voir dire a big deal in a case that's only going to last a couple of days'" and because he did not want to embarrass the jurors. *Id.* He instructed the lawyers that they could "infer from their occupation and their accent what kind of education [the venirepersons] have." *Id.*

44. Higginbotham, *supra* note 41, at 11.

45. There are, of course, limits to what the lawyers can ask even if they are permitted to address the jurors directly. See, e.g., Hinkle v. Hampton, 388 F.2d 141, 143 (10th Cir. 1968) (lawyers not permitted to seek pledge from jurors to give equal weight to testimony of osteopathic doctors and medical doctors). These limitations can be enforced with lawyer voir dire in a number of ways. For example, the court could require a list of the questions counsel wished to ask in time for the opposing party to object. Alternatively, the court could simply wait for an objection during voir dire and rule. The risk of being silenced by the judge so

judges in the Second Circuit who experimented with this procedure found it to be helpful and planned to continue using it.⁴⁶ One commentator has concluded that at least a limited role for lawyer voir dire is "growing in popularity."⁴⁷

Congress has repeatedly failed to enact legislation to reintroduce a more active role for counsel in voir dire.⁴⁸ It is, however, in the power of individual judges to effect this change. Federal Rule of Civil Procedure 47 provides that the "court may permit the parties or their attorneys to conduct the examination of prospective jurors." It is within the inherent power of the court to limit how long lawyers have to conduct voir dire, as long as the time is not unreasonably short.⁴⁹ It is time to reverse the trend of judicial voir dire and put the litigants back in control of the questioning. The need to ensure that the proceedings are perceived as fair demands no less.

Judges, however, have resisted lawyer voir dire for a long time. There is now reason to hope that lawyers and litigants will not have to rely simply on an individual judge's willingness to permit them to participate directly in voir dire. The Standing Rules Committee is considering a proposed change to Rule 47.⁵⁰ That proposed rule change would allow attorneys to supplement the court's voir dire questioning by asking some questions directly, subject to the trial court's control.⁵¹ This is a small step, and it is made smaller by the stipulation that the judge's control of the attorney voir dire would be reviewed under the abuse of discretion standard.⁵² Yet it is a step in the right direction to attempt to preserve for litigants a measure of the appearance of fairness.

early in the proceedings, in front of the jury, should dissuade counsel from abusing the chance to address the jurors directly.

46. Sand & Reiss, *supra* note 4, at 429.

47. Tanford, *supra* note 35, at 628.

48. See *supra* note 42, and sources cited therein; see also S.P. No. 677, 98th Cong., 1st Sess., § 2122 (1983) (attempting to amend Rule 47(a)).

49. The Supreme Court has recently written on the broad inherent power of the federal trial courts to control litigation before them. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (court has inherent power to sanction bad faith conduct of litigants). Numerous courts assumed for years without contradiction that they had the authority to limit the length of trials before the Federal Rules of Civil Procedure confirmed that authority. Longan, *Shot Clock*, *supra* note 6, at 665-666 n.5. That inherent power carries with it the power to impose reasonable time limits on particular phases of the trial such as voir dire.

50. Higginbotham, *supra* note 41, at 11.

51. *Id.*

52. *Id.* This proposed change is remarkably similar to the one proposed ten years ago by Judge Thomas Wiseman. See Wiseman, *supra* note 37, at 5-6.

2. How Should the Court Handle the Unresponsive Juror?

One common, if not universal, problem in voir dire is the juror who should respond but does not respond to a question. *Photostat v. Ball*⁵³ is an example of how common this problem is. There, no fewer than four jurors failed to respond to a simple question about whether any of them had been involved in claims for injuries. The O.J. Simpson murder trial provided another vivid example when a juror had to be excused because she had "forgotten" to reveal that she had made allegations of physical abuse by her husband.⁵⁴ The problem is inherent in matters that come up only in the public forum of voir dire, rather than the more private forum of a juror questionnaire. The intimidating atmosphere of the courtroom combines with jurors' natural shyness and unfamiliarity with the surroundings to silence them when they might otherwise be more open.

In *McDonough Power Equipment, Inc. v. Greenwood*,⁵⁵ the Supreme Court faced this problem. In that case, the plaintiff sought recovery for injuries to a small child whose feet were severed by a lawn mower that allegedly was designed improperly. During voir dire, the panel was asked if any potential juror had a member of his or her immediate family who suffered "injuries . . . that resulted in . . . disability or prolonged pain and suffering"⁵⁶ The man who eventually became the foreman of the jury, Mr. Payton, did not respond, even though his son's leg had been broken by an exploding tire.⁵⁷ The plaintiff lost. When Mr. Payton's son's accident was brought to the plaintiff's attention, the plaintiff sought a new trial.

The Supreme Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."⁵⁸ Information that would have been relevant to a potential peremptory

53. 338 F.2d 783 (10th Cir. 1964).

54. David Margolick, *Judge Replaces a Sixth Simpson Juror*, N.Y. TIMES, April 6, 1995, at B8 ("The change was made . . . after [Judge Ito] learned that the dismissed juror, a 38-year-old married woman, had not been candid when asked about her own experiences with domestic violence.").

55. 464 U.S. 548 (1984).

56. *Id.* at 550.

57. *Id.* at 552.

58. 454 U.S. at 557. Justice Rehnquist's opinion commanded five votes and thus is the opinion of the Court. It must be noted, however, that five justices concurred, and thus the exact meaning of *McDonough* remains in some dispute. See generally Crump, *supra* note 39, at 749-751.

challenge but was not revealed in response to a proper question on voir dire is not enough. Thus, if a litigant learns after losing a jury verdict that one of the members of the jury failed to respond to a voir dire question, even if the omission was deliberate, and the truth would certainly have been important enough for that party to challenge the juror peremptorily, the verdict must stand.

That holding does enormous damage to the perception of fairness of the trial. As discussed in more detail below, the primary function of the peremptory challenge is to give the litigant power to shape the jury and thus to make the trial appear more fair.⁵⁹ Anything that makes the peremptory challenge less useful undermines that appearance. Failure to grant a new trial when a juror's inadvertent or devious failure to disclose valuable information caused the party to strike the wrong juror is to tell the losing party to live with a result rendered by what now appears clearly to be a flawed process. Such a result will not be seen as fair.

Of course, one cannot simply rely on the lawyer's word that certain omitted information would, in a particular case, have been sufficient for the lawyer to use a peremptory challenge. A lawyer who has just lost a verdict might yield to the temptation to say, with 20/20 hindsight, that of course the omission changed his or her strategy and therefore affected the composition of the jury. Something other than the lawyer's subjective reaction to the information, after the fact, is necessary.

There is a better approach. Professor David Crump has proposed a "standard that asks whether the average attorney of reasonable skill would have been particularly likely to exercise a peremptory challenge if provided with correct answers to his questions."⁶⁰ This standard would not view the losing lawyer's statement that he or she would have stricken the offending juror as controlling, or even relevant. The standard requires that the court make an objective assessment of the importance of the omitted information. This more liberal standard would result in more verdicts being set aside, and that is costly.⁶¹ But it would repair most of the

59. See *infra* section III.B.2.

60. Crump, *supra* note 39, at 775.

61. The costliness of a new trial was a major factor in Justice Rehnquist's opinion in *Greenwood*. He wrote:

To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a

damage done to the perception of fairness because it does not force a losing party to abide by a verdict reached by a jury that may have been poisoned by the presence of a biased juror.⁶² Some courts have moved in this direction despite the clear language of Justice Rehnquist's opinion in *McDonough* that only information sufficient for a challenge for cause and deliberately withheld will suffice to obtain a new trial.⁶³

The preservation of the appearance of fairness requires the broad adoption of such a standard. Otherwise, jury verdicts that appear to be the product of biased jurors will undermine the perception of the fairness of the process.

B. Challenges to Jurors

After the voir dire is complete, the parties "select" the jury by exercising challenges for cause and peremptory challenges and thereby excluding particular members of the array from the jury. This power to participate in the selection of the jury contributes significantly to the perception that the system is fair, but the power is being eroded. How that is happening, and how to repair the damage, are the subjects of this section.

1. Challenges for Cause

Parties may challenge potential jurors for "cause," but the standard for a challenge for cause is difficult to satisfy.⁶⁴ There must be evidence strong enough for the court to conclude that the juror actually has an opinion about the case that is so strong as to raise a presumption of partiality.⁶⁵ A direct financial interest in the outcome, for example, is sufficient to show a likely bias.⁶⁶ The problem is that so little else does.

There are abundant examples of indications of bias that do not suffice for a challenge for cause. A potential juror who expresses a preliminary view during voir dire of how the case should come out is not excusable for

juror on *voir dire* examination.

464 U.S. at 555.

62. Professor Crump expresses the same idea when he writes that his more liberal standard for new trials "preserves the litigant's perceptions of fairness, by protecting the adversary attorney's rational exercise of peremptory challenges." Crump, *supra* note 39, at 775.

63. *Id.* at 776, and cases cited therein.

64. JODY GEORGE ET AL., HANDBOOK ON JURY USE IN THE FEDERAL DISTRICT COURTS 199-200 (1989).

65. *Reynolds v. United States*, 98 U.S. 145, 157 (1878).

66. *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971).

cause if that juror states that he can be fair and may change his mind if the evidence warrants.⁶⁷ A juror who is employed by a party need not always be excused for cause.⁶⁸ A juror who is employed by the same type of insurance company as the one defending the case need not be excused for cause.⁶⁹ Law enforcement personnel who have investigated claims similar to that involved in a civil case are not presumed to be partial.⁷⁰ A patient of the defendant in a medical malpractice case did not have to be excused for cause, nor did a juror in the same case who was a defendant in a medical malpractice case.⁷¹ An employee of an oil company need not be excused in another suit involving an oil company.⁷²

The narrow standard for cause potentially does significant damage to the appearance of fairness of any trial. In each of these cases, one party is not likely to feel the process is a fair one if that juror remains. The basis for the perception of partiality is apparent to everyone. Yet the court refuses to acknowledge the potential bias or do anything about it. The party is left to fix the problem through the exercise of one of his or her few peremptory challenges. While the peremptory challenge is one way to take care of a biased juror who is not challengeable for cause, the peremptory challenge itself is being undermined. To the extent that the peremptory challenge is being undermined, the scope of the challenge for cause may need to be expanded.

2. Peremptory Challenges

A peremptory challenge is one that, historically, did not require any explanation or justification.⁷³ The peremptory challenge has a long history.⁷⁴ Civil litigants in federal court have long been permitted to strike potential jurors without the need for explanation. The primary importance of the peremptory challenge is the appearance of fairness of the trial to the litigants:

The primary purpose for allowing challenges without a showing of cause has been to promote the appearance of justice. This concept

67. *Geagan v. Gavin*, 292 F.2d 244, 248-249 (1st Cir. 1961).

68. *Neveaux v. Central Gulf S.S. Corp.*, 503 F.2d 961, 962 (5th Cir. 1974).

69. *Lusich v. Bloomfield S.S. Co.*, 355 F.2d 770, 775 (5th Cir. 1966).

70. *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653, 665 (1965).

71. *Poynter v. Ratcliff*, 874 F.2d 219, 222 (4th Cir. 1989).

72. *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1129-30 (6th Cir. 1990).

73. *Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.").

74. *Id.* at 212-17.

was succinctly stated by the Supreme Court in *Swain v. Alabama*: "[T]o perform its high function in the best way, justice must satisfy the appearance of justice." Allowing parties to excuse jurors, even for sudden impressions, unaccountable prejudices or for arbitrary and capricious reasons, helps courts to attain that goal. Peremptory challenges provide a method of removing potentially biased jurors who could not be removed for cause, because either the judge refused to grant the challenge or no overt apparent cause existed. The parties have a greater voice in the selection of their own jury, which enhances the acceptability of the verdict and of the judicial system as a whole. The critical policy goal of "appearance of justice" is accomplished.⁷⁵

Parties who participate actively in the shaping of the jury feel better about it. Parties who are permitted autonomy—and the peremptory challenge traditionally has made them more autonomous—will perceive the proceedings to be more fair.

The perception of the fairness of the jury often flowed from the exclusion of jurors who were unlike the litigant in some way and therefore less likely to identify with, and be fair to, that party. As recently as *Swain v. Alabama*,⁷⁶ the United States Supreme Court noted without great indignation that peremptory challenges often were exercised on the basis of prejudice against races and religions.⁷⁷ No less an authority on juries than Clarence Darrow has written:

If a Presbyterian enters the jury box, carefully rolls up his umbrella, and calmly and critically sits down, let him go. He is cold as the grave; he knows right from wrong, although he seldom finds anything right. He believes in John Calvin and eternal punishment. Get rid of him with the fewest possible words before he contaminates the others; unless you and your clients are Presbyterians you

75. Frederick V. Olson, Note, *Edmonson v. Leesville Concrete Co.: Reasoned or Result-Oriented Jurisprudence?*, 12 N. ILL. U. L. REV. 497, 499-500 (1992); see also Roberta K. Flowers, *Does it Cost Too Much? A "Difference" Look at J.E.B. v. Alabama*, 64 FORDHAM L. REV. __ (1995) at __ and sources cited therein. The peremptory challenge can also be used in such a way as to make the trial appear less fair. For example, its use to exclude members of racial groups, a practice outlawed in civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), would make litigants of that racial group less confident in the legal process. See Brand, *supra* note 12, at 520 ("[P]urposeful exclusion of African-Americans from juries undermine[s] public confidence in the legal process.").

76. 380 U.S. 202 (1965).

77. *Id.* at 220 (the peremptory challenge "is no less frequently exercised on grounds normally thought [to be] irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.").

probably are a bad lot, and even though you may be a Presbyterian, your client most likely is guilty.

If possible, the Baptists are more hopeless than the Presbyterians. . . . The Methodists are worth considering; they are nearer the soil. Their religious emotions can be transmuted into love and charity. They are not half bad, even though they will not take a drink; they really do not need it so much as some of their competitors for the seat next to the throne. If chance sets you down between a Methodist and a Baptist, move toward the Methodist to keep warm.⁷⁸

The litigant with such prejudices will perceive the trial to be fairer if he is permitted, by the peremptory challenge, to eliminate the targets of his bigotry.

The peremptory challenge is dying a slow death.⁷⁹ The Supreme Court in *Batson v. Kentucky*⁸⁰ began the process by holding that prosecutors in a criminal case may not strike jurors solely because of their race. The Court extended the *Batson* rule to civil cases in 1991 in *Edmonson v. Leesville Concrete*.⁸¹ In *J.E.B. v. Alabama*, the Court held that lawyers may not strike potential jurors solely on the basis of their sex.⁸² The result is that in civil cases today, the lawyer whose strikes betray a "pattern" of striking either members of a particular race or sex must articulate a race or sex neutral basis for the strike.⁸³ The reasoning of *Edmonson* and *J.E.B.* may lead to further erosion of or extinction of the peremptory challenge. The validity of strikes based upon religion, foreign language ability, disability, sexual orientation, age, socioeconomic status, and other criteria have also been questioned.⁸⁴

78. JAMES W. JEANS, TRIAL ADVOCACY § 7.7 (quoting Clarence Darrow, ESQUIRE, (1935)).

79. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (Thomas, J., concurring) (the prohibition on race-based strikes that began with *Batson* "inexorably will lead to the elimination of peremptory strikes.").

80. 476 U.S. 79 (1986).

81. 500 U.S. 614 (1991).

82. *J.E.B. v. Alabama*, 114 S. Ct. 1419 (1994).

83. For a general description of this process, see David Hittner & Eric J.R. Nicols, *Jury Selection in Federal Civil Litigation*, 23 TEX. TECH L. REV. 407, 461-473 (1992).

84. See *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994), cert. denied, 115 S. Ct. 439 (1994) (peremptory challenges based upon foreign language ability do not violate equal protection); *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (strikes based upon religion do not violate equal protection). See also Gerald A. Bunting and Lesley A. Reardon, *Once More Into the Breach: The Peremptory Challenge After Edmonson v. Leesville Concrete Co.*, 7 J. OF LEGAL COMM. 329, 349-59 (1993) (discussing the extension of *Edmonson* to other groups); Mary A. Lynch, *The Application of Equal Protection to Prospective Jurors With Disabilities: Will Batson Cover Disability-Based Strikes?*, 57 ALB. L. REV. 289 (1993).

The challenge to a juror is no longer peremptory as soon as it must be justified.⁸⁵ The need to obtain the court's approval for a strike undermines the very purpose of the peremptory strike: to give the litigants some control over the composition of the jury that will decide their case. The composition of the jury becomes something that is imposed even more by others because the litigants have less power to shape it. It will be seen as less fair if the litigant's power to shape the jury is diminished.⁸⁶

3. A New Standard: Exclusion for Apparent Partiality

The combination of a narrow challenge for cause and the eroding peremptory challenge is creating an intolerable appearance during jury selection. Litigants may justifiably feel that the fact-finder for their case is not unbiased, and that they have little power to eliminate persons who appear unmistakably biased against them. The challenge for cause is too narrow. The peremptory challenge is fraught with new perils.⁸⁷ A new method for jury selection is necessary.

A better approach would be to confront the problem of perceived fairness directly and permit a party to have a potential juror stricken upon a showing of "apparent partiality." A possible standard would be that a juror must be excused from service on a civil jury if the party challenging the juror shows, solely on the basis of the content of the juror's responses in voir dire, that a reasonable litigant in the position of that party would seriously doubt the juror's willingness or ability to be impartial. Parties would have unlimited challenges for apparent partiality. They would not

85. See A. Wallace Tashima, *The Revolution in Federal Civil Jury Selection*, 19 LITIG. 5 (Fall 1992) ("Until recently, it was generally understood and accepted that a peremptory challenge was 'peremptory' in one of the senses that Webster defines the word: 'admitting of no contradiction.'").

86. It is possible, of course, that *Edmonson* and *J.E.B.* will have no practical effect. A party whose strikes are questioned may respond with race or sex-neutral reasons for the strike. If the Court is willing to accept subjective explanations at face value, then the objection and the response will be nothing more than a distracting sideshow that does not truly constrain jury selection. For example, lawyers have succeeded with explanations such as that the juror had an "expression that conveyed . . . some hostility," the juror "glared," and the juror appeared to "find the whole process distasteful." Hittner, *supra* note 83, at 466-67. Such a charade, however, would have its own effect on the perception of the fairness of the proceeding. Anytime the stated standards of the tribunal are enforced only with a wink and a nod, the litigant inevitably must begin to wonder about the legitimacy of the remaining procedures.

87. The remedy for a violation of *Edmonson*, for example, is a new trial if the trial court does not sustain the objection to the race-based strikes. *Id.* at 473.

be permitted to use nonverbal criteria such as the juror's "inattentiveness."⁸⁸ Permitting challenges on such bases would be unmanageable and certainly unreviewable. Only the content of the potential juror's remarks would matter. Subjective belief in partiality also would not be enough; otherwise, this new standard for apparent partiality would be nothing more than a peremptory challenge. The court must apply an objective standard from the perspective of the challenging party. These requirements will better serve the need for the appearance of fairness directly and will be reviewable on a cold record on appeal.

The new standard for apparent partiality would provide the remedy for the narrow challenge for cause. Each of the examples mentioned above, from the juror who expresses a "preliminary" view about a case to the juror who is employed by a company like one of the parties, would be a strong case for excusing jurors based upon apparent partiality. Even if these jurors could actually be fair, the appearance created by their participation is intolerable. Since the peremptory challenge is no longer the weapon it once was, the new remedy of the challenge for apparent partiality is necessary.

4. Methods of Striking Jurors

When the parties are preparing to exercise their peremptory challenges, the court must decide how they will do so. The two most common methods are the "struck jury" method and the "jury box" method.⁸⁹ In the former, voir dire is directed to the entire venire. After challenges for cause, the lawyers are told which members of the venire are potential jurors and then they exercise their strikes, either simultaneously or in turns.⁹⁰ With the jury box method, the parties start with the jury box full and decide which, if any, of these (usually six) jurors to strike. As jurors are stricken, members of the venire are brought forward and placed in the jury box for examination, and the lawyers are again given the opportunity to challenge for cause or, if unsuccessful, to make a peremptory challenge.⁹¹ The process continues until the parties have run out of strikes or have a jury that neither side wishes to alter.

88. See, e.g., *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (a challenge based upon inattentiveness "requires subjective judgments that are particularly susceptible to the kind of abuse prohibited by *Batson*"), quoted in Hittner, *supra* note 83, at 468-69.

89. See generally, Hittner, *supra* note 83, at 451-54.

90. *Id.* at 451-52.

91. *Id.* at 452-53.

From the perspective of perceptions of fairness, the problem with both of these systems is that the parties are not as autonomous as they might be. They have a limited set of options because all they are permitted to do is to strike from a predetermined set of potential jurors. It is "a rejective, rather than a selective, process."⁹² Another approach would be to permit the parties actually to choose jurors that they want from the venire rather than merely strike from the panel.⁹³ The process would be simple enough. The lawyers could complete their voir dire to the panel and exercise their challenges for cause, their challenges for apparent partiality, and their peremptory challenges. Each could then choose one-half of the jury.⁹⁴ If the selections overlap, the court could select the remainder of the jury or, even better, involve the parties further.⁹⁵

Litigants who are given more control over the selection of the jury that will hear their case, as such a system would provide, are more autonomous and will perceive the trial to be fairer. Each of the proposed modifications to jury selection better serves the cause of apparent fairness by reinforcing the perception that the jurors will be unbiased and by giving the parties more autonomy in the process of jury selection. The end result of such a process will be more acceptable to all parties.

IV. THE APPEARANCE OF FAIRNESS AND THE TRIAL JUDGE

A. *Disqualification for the Sake of Appearances*

An impartial judge is central to the parties' perceptions about the fairness of a proceeding. In theory, the trial judge in an adversary system learns about the case as it unfolds at trial, without the opportunity beforehand to learn about or comment upon the merits of the case.⁹⁶ That theory is far from reality:

92. *United States v. Costello*, 255 F.2d 876, 884 (2nd Cir. 1958).

93. Schwarzer, *supra* note 4, at 580-81.

94. The number of jurors the parties will choose may be about to change. The Standing Committee on Civil Rules is proposing to return the civil jury to its traditional size of twelve rather than the six that has become the norm. Higginbotham, *supra* note 41, at 11. For the background of the controversy surrounding the appropriate size of the jury, see Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OR. L. REV. ____ (1995).

95. The court, for example, could divide the remaining spots on the jury by half and, once again, let each side choose that number of jurors who remain in the venire. Alternatively, the court could ask for a larger number of jurors from each side and seat any who appear on both lists. The details are less important than the attempt to keep the parties involved in the process as actively as possible to encourage the sense of autonomy that is so crucial to the perception that the process is fair.

96. Fuller, *supra* note 19, at 385-87.

In the federal system, where cases are assigned to a specific judge at the time of filing, that judge must deal with discovery disputes, motions, scheduling, and pretrial conferences Even in the absence of aggressive pretrial management, therefore, federal judges commonly encounter the merits of their cases before trial—when they rule on motions for injunctive or other relief, when they pass on the sufficiency of pleadings or summary judgment motions, when they rule on the scope of discovery, and when they hold pretrial conferences which require the judge to have some understanding of the case.⁹⁷

This single calendar system thus presents an inherent threat to the impartiality, and the perceived impartiality, of the trial judge.

Congress sought to minimize problems of perceived partiality when it legislated that federal judges must disqualify themselves from cases in which their “impartiality might reasonably be questioned.”⁹⁸ The Supreme Court has written that “[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.”⁹⁹ Many of the cases under this section deal with relationships between the judge and a party or a party’s counsel.¹⁰⁰ A much harder case is one where the judge forms an opinion about the case, and expresses it, based upon events during the course of the case. As we have seen, it is almost inevitable that such opinions will be formed. The problem is what, if anything,¹⁰¹ to do about them. There has been much controversy in recent years regarding whether recusal should ever be necessary when the judge’s opinions about a case are not based on an “extrajudicial source.”¹⁰²

97. Schwarzer, *Discovery Reform*, *supra* note 19, at 707.

98. 28 U.S.C. § 455(a) (1994).

99. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988).

100. *E.g.*, *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280 (9th Cir. 1992) (recusal required when judge’s former law partner was local counsel for one party to the litigation); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir.), *cert. denied*, 503 U.S. 984 (1991) (recusal not necessary when judge’s son is employed by one party to the litigation); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988).

101. Many cases have held that such circumstances should not result in disqualification or recusal. *See Reynolds*, *supra* note 21, at 185 n.65 (listing cases). *See also Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991) (no recusal necessary when court states at pretrial conference that he has seen better cases); *United States v. Sutherland*, 463 F.2d 641, 650 (5th Cir.), *cert. denied*, 409 U.S. 1078 (1972) (no disqualification for stating before the trial was over that criminal defendant was guilty).

102. For general background on the controversy, *see* Christopher R. Carton, Comment, *Disqualifying Federal Judges For Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057 (1994); Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial*

1. *Liteky v. United States*

The United States Supreme Court recently faced this question and purported to resolve it. In *Liteky v. United States*,¹⁰³ several criminal defendants sought to have a trial judge disqualify himself because the judge had displayed “impatience, disregard for the defense, and animosity” toward the defendants and their beliefs based upon a prior trial involving the same defendants.¹⁰⁴ The Court held that, as to expressions of opinion based upon information gathered in the course of judicial proceedings, disqualification would be necessary only under the following circumstances:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.¹⁰⁵

The Court held that disqualification was not necessary in the case before it.¹⁰⁶

2. *Liteky* and the Appearance of Fairness

Liteky potentially will do serious damage to the appearance of fairness. Recall that the statutory standard is that the judge must be disqualified if the judge's impartiality “might reasonably be questioned.” The disqualification for partiality based upon knowledge gained during the pretrial process is necessary, according to *Liteky*, only if the judge's comments reveal that the judge is actually unable to make fair judgments. Opinions based on the proceedings themselves suffice only if they “make fair judgment impossible.”¹⁰⁷ The appearance of fairness has been read out of the statute.

Disqualification under 28 U.S.C. § 455(a), 15 CARDOZO L. REV. 787 (1993).

103. 114 S. Ct. 1147 (1994).

104. *Id.* at 1151.

105. *Id.* at 1157.

106. *Id.* at 1158.

107. *Id.* at 1157.

The problem is a serious one. A recent example is *Haines v. Liggett Group, Inc.*,¹⁰⁸ one of a number of recent cases seeking damages for the wrongful death of a smoker against the manufacturer of the decedent's cigarettes. A dispute arose regarding the discoverability of documents relating to the Council for Tobacco Research, an industry-funded research organization. The documents at issue concerned Council "special projects." Such projects were funded only after consultation with counsel about whether the project might be helpful in litigation. The plaintiffs sought to overcome the attorney-client privilege by showing that "the Council was a fraudulent public relations ploy . . . [whose] function was to assist the tobacco industry in various ways."¹⁰⁹ The plaintiff invoked the exception to the attorney client privilege for communications between lawyer and client in furtherance of a crime or a scheme to defraud.

To decide the discoverability issue, the district court obviously had to become intimately acquainted with the issues and evidence in the case. Further, to decide the issue the court had to make at least a preliminary judgment regarding the defendant's conduct with respect to the Council for Tobacco Research and decide whether it, along with its lawyers and other members of the industry, were engaged in a criminal or fraudulent scheme. The court necessarily and properly made these assessments.

The problem is that the court, having made these necessary assessments, expressed them in such an intemperate way that no litigant who was the target of them could feel that anything approaching a fair trial was coming. The district judge wrote:

In the light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity!

As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.¹¹⁰

108. 975 F.2d 81 (3d Cir. 1992).

109. *Id.* at 85.

110. *Id.* at 97. Another recent example comes from the litigation surrounding the rights of homosexuals in the military. When the trial judge in the case of Keith Meinhold ordered

Judge Sarokin may be right about the tobacco industry.¹¹¹ But a tobacco company, like any other litigant, is entitled not only to a fair trial but also to a trial that appears to be fair. These remarks destroy that appearance for all time. The United States Court of Appeals for the Third Circuit, in an "agonizing" portion of its opinion, disqualified Judge Sarokin from the case because his remarks destroyed the appearance of impartiality.¹¹²

After the Third Circuit disqualified him from *Haines*, Judge Sarokin recused himself from another case involving similar issues.¹¹³ He wrote:

I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for determination. If the standard established here had been applied to the late Judge John Sirica, Richard Nixon might have continued as President of the United States.¹¹⁴

The problem is that words—forceful language—matter. The very forcefulness of his language creates the reasonable impression in the minds of one of the litigants that the judge is passionately committed to the other side's case and cannot give them fair treatment from then forward. As one commentator put it, "[h]e sounded more like Ralph Nader than Oliver Wendell Holmes."¹¹⁵ He undermined the appearance of fairness and was

that he be reinstated by the U.S. Navy pending a final resolution of the case, he said: "This is not a military dictatorship. It is not the former Soviet socialist republic. Here, the rule of law applies to the military . . . even the commander-in-chief." *Pentagon Agrees to Readmit Gay Sailor*, ST. PETERSBURG TIMES, November 11, 1992, at 8A.

111. See Peter Hanover, et al., *Lawyer Control of Internal Scientific Research to Protect Against Products Liability Lawsuits*, 274 J. AM. MED. ASS'N 234 (July 19, 1995) (discussing efforts of lawyers to conceal information regarding health effects of smoking).

112. *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3rd Cir. 1992). The court made quite clear that the basis for the ruling was to preserve the appearance of fairness:

Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L.Ed.2d 301 (1968), the United States Supreme Court stated: "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Id., quoting *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.), cert. denied, 459 U.S. 880 (1982).

113. *Cippolione v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992).

114. *Id.*

115. Andrea Sachs, *Judge Forced Off Tobacco Suit*, A.B.A.J., Nov. 1992, at 16 (quoting Stephen Gillers of the New York University School of Law). In another case, the United States Court of Appeals for the Fourth Circuit recently disqualified a district judge from an auto accident case after the judge made a decidedly pro-plaintiff speech at the South Carolina Trial Lawyers Association Auto Torts Seminar. *Fourth Circuit Vacates Default Judgment, Recuses District Judge*, FEDERAL DISCOVERY NEWS, June 1995, at 12-13.

properly disqualified, lest other judges choose to express their pretrial views on the merits of the case in similarly damaging ways.

Yet *Liteky* requires a different result. Judge Sarokin is a highly respected judge.¹¹⁶ The Third Circuit in its opinion disqualifying him in the *Haines* case noted the judge's reputation and stated that, despite the tone of his comments about the tobacco industry, "we would not agree that he is incapable of discharging judicial duties free from bias or prejudice."¹¹⁷ Under *Liteky*, however, the Third Circuit could have disqualified Judge Sarokin for these comments, which were based upon information gained during the course of the judicial proceedings, only if they "display a deep-seated favoritism or antagonism as to would make fair judgment impossible."¹¹⁸ This is precisely what the Third Circuit found not to be true. Judge Sarokin would be entitled to remain on the case.

The appearance of fairness is different from actual fairness but is also important. Yet, despite its importance, and despite the requirement of Section 455 to consider it, the perception of impartiality becomes irrelevant in these cases after *Liteky*. Litigants will understandably fear that their cases will be handled by judges who, from the litigants' perspective, cannot be impartial. Trial judges have enormous discretion in the management of cases both pre-trial and during the management of the trial.¹¹⁹ The exercise of such discretion by an authority whose impartiality is questioned, and reasonably so, is offensive to the appearance of fairness and should not be permitted. *Liteky* was wrong and should be overruled.

A better standard would be to reintroduce the appearance of partiality as a basis for recusal or disqualification, even for cases in which the only knowledge the court has about the case comes from the legal proceedings themselves. One way to state this standard would be to require a judge to disqualify himself or herself from any legal proceeding in which a party reasonably fears that the judge is partial, if that reasonable fear is based

116. On October 28, 1994, Judge Sarokin was elevated to the United States Court of Appeals for the Third Circuit. 4 FEDERAL COURT APPOINTMENTS REPORT, Mar/Apr 1995, at 9.

117. 975 F.2d at 98.

118. 114 S. Ct. 1147, 1157 (1994). See also Lori M. McPherson, Comment, *Liteky v. United States: The Supreme Court Restricts the Disqualification of Biased Federal Judges Under Section 455(A)*, 28 U. RICH. L. REV. 1427, 1443-44 (1994) (discussing how *Liteky* undermines the appearance of fairness).

119. With respect to pretrial matters, see, e.g., FED. R. CIV. P. 26 (b)(2) (court can preclude discovery of relevant information based upon the needs of the case, the resources of the parties and the amount in controversy, among other factors); with respect to trial, see, e.g., FED. R. EVID. 403 (court may exclude relevant evidence if its prejudicial impact outweighs its probative value).

upon the content of the judge's remarks on the record or in a written opinion. "Content" as used here would not include the court's ruling against a party but would focus on the court's explanation of the ruling. For example, that Judge Sarokin ruled against the Liggett Group's claim of privilege in their discovery dispute should not be a basis for disqualification. The explanation of that ruling, however, would be a basis for doing so. The court's inflection or facial expressions should not be a basis for disqualification because such contentions would be unreviewable on appeal.¹²⁰ This new standard, as an interpretation of Section 455, would likely discourage the type of language employed by Judge Sarokin. Such language should be discouraged because of the effect it has on the appearance of the fairness of the process. More fundamentally, this standard would preserve the appearance of partiality as a basis for disqualification, as the unambiguous language of the statute requires.

B. *Judicial Involvement in Settlement*

The potential problem with a judge's public pronouncements, as we have seen, is that they can create the reasonable fear of partiality. That fear can arise just as easily, however, from remarks made in chambers or in a written opinion. In particular, a plaintiff at trial is not likely to feel that the trial will be fair if the presiding judge has already told that party, face to face, that the case is worthless.¹²¹ A defendant is unlikely to feel safe before a judge who has vividly described how strong the judge believes the plaintiff's case to be.¹²² Such remarks, however, are likely and indeed necessary when the trial judge undertakes to "assist" the parties in reaching a settlement of a case. Such assistance is often necessary, and the rules promote it. For the assistance to be effective, however, the judge must destroy the appearance of fairness of the proceeding if it does go to trial. As a result, it is time to require recusal of trial judges from trial of cases in which they have participated in settlement conferences.

120. See Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

121. Cf. *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991) (judge states in pretrial conference that the court has seen better cases).

122. See James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation?"*, 19 FLA. ST. U. L. REV. 47, 67-68 (1991) (describing how a mediator might work on a defense lawyer by "pointing out outstanding medicals, lost wages, and other special damages, then tallying them up and a certain percentage of pain and suffering and come up with a figure. And then they may discuss the strength of the case.").

1. Why Settlement Assistance is Necessary

I have written in much greater detail elsewhere why parties to civil litigation today are in such great need of assistance in settling their cases.¹²³ There are two primary reasons. The first is that litigants cannot settle their cases if they are unable to predict what will happen if the case is taken to trial.¹²⁴ Civil litigators today find that type of prediction to be increasingly difficult, and they need experienced help in doing it.¹²⁵ The second reason is that the parties themselves often need an opportunity to tell their story to a third party, and to hear that third party's reaction to it, before settlement is possible.¹²⁶ The litigant may simply need the catharsis of telling the story and may need to have exaggerated expectations brought into line with reality.¹²⁷ For these reasons, alternative dispute resolution has become an integral part of the civil litigation process.¹²⁸

2. The Judge's Role in Settlement

Judges have involved themselves in settlement discussions for a long time.¹²⁹ Recent developments have increased that role and its visibility. In 1983, Federal Rule of Civil Procedure 16 was amended to include settlement as one of the possible topics for pretrial conferences.¹³⁰ The 1993 amendments added that "[i]f appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."¹³¹ This practice had already begun but was controversial.¹³² The trial judge

123. Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712 (1994) [hereinafter Longan, *Bureaucratic Justice*].

124. *Id.* at 720 and sources cited therein.

125. *Id.* at 5-6; see also Longan, *Shot Clock*, *supra* note 6, at 685-87.

126. Longan, *Bureaucratic Justice*, *supra* note 123, at 722.

127. *Id.*

128. *Id.* at 725-45 (comparing how different types of mediation help parties overcome obstacles to settlement).

129. See, e.g., HUBERT L. WILL ET AL., *THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS* (1983) (experienced judges discussing what they have done to promote settlement).

130. FED. R. CIV. P. 16(c)(9) lists as one of the appropriate topics for pretrial conferences "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."

131. FED. R. CIV. P. 16(c).

132. See, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989)(en banc) (discussing whether the trial judge had inherent authority to require a represented party to appear at a pretrial conference for the purpose of discussing settlement).

thus can become personally involved in the settlement negotiation, with the litigants personally present in chambers.

The court's involvement, and the parties' mandatory presence, reflect the underlying need for assistance in settlement. The judge, as an experienced participant in numerous trials, is able to provide valuable information about the likely outcome of the case.¹³³ The court hears at least a description of the evidence and frankly tells the lawyers and parties what the judge thinks of their positions.¹³⁴ This information assists the parties in coming to similar expectations for trial, which makes settlement much more likely. The personal presence of the parties also makes settlement more likely as they are able to explain their positions to an impartial third party with all the trappings of judicial office.¹³⁵ They also are more likely to evaluate their case realistically if they hear bad news from the judge.¹³⁶ The judge as settlement officer thus serves a valuable function by providing the lawyers and parties with exactly the type of assistance they need.¹³⁷

3. The Effect on the Appearance of Fairness

The inevitable effect on the appearance of the fairness of the trial, if trial remains necessary, is devastating. The only way for the settlement conference to assist the lawyers in coming to similar expectations about the likely outcome of the trial is for the judge to state what the judge thinks of the case. At least one side is not likely to enjoy that experience. Furthermore, for settlement to work best the party needs to be personally present. Although that presence serves a valuable function in settlement, the client who refuses to settle at this time faces the prospect of a trial in

133. Longan, *Bureaucratic Justice*, *supra* note 123, at 734.

134. United States Magistrate Judge Wayne D. Brazil, who has written extensively about the settlement process, writes that "good judges become skillful at cutting through verbal and emotional camouflage to identify pivotal issues, at ferreting out key evidence, assessing credibility, and analyzing strengths and weaknesses of arguments." WAYNE D. BRAZIL, *SETTLING CIVIL SUITS* 45 (1985).

135. One retired judge put it this way: "If you're a retired judge you bring much more prestige to the mediation table than an attorney because the people look at the attorney and say, 'I have an attorney; what do I need this guy for?' A judge they listen to." Alfini, *supra* note 122, at 69, *quoted in* Longan, *Bureaucratic Justice*, *supra* note 123, at 734. If retired judges have this much prestige, the judge who is still in office and holds the settlement conference in the august surroundings of the judge's chambers will have even more of an effect.

136. Longan, *Bureaucratic Justice*, *supra* note 123, at 734.

137. This conclusion puts aside any question of misbehavior by the trial judge who is intent upon coercing a settlement. It should be recognized, however, that the danger of coercion is real. *Id.* at 734-35.

which this person who has told them, face to face, that the case is weak, will be the presiding judicial officer. The very things that make the settlement conference valuable in promoting settlement inevitably destroy the appearance of impartiality for the case that, for whatever reason, does not settle.

Judges have recognized this problem for a long time and traditionally have tried to avoid settlement conferences in cases that will be tried to the court.¹³⁸ That practice is desirable but insufficient. The litigant who has rejected the trial judge's settlement advice will not perceive even a jury trial as fair if that same judge is presiding. To preserve the appearance of fairness, the settlement judge should be disqualified from presiding over the trial. That is not the law today.¹³⁹

4. Alternatives to the Settlement Judge as Trial Judge

The dilemma is how to promote settlement for the vast majority of cases that can be settled¹⁴⁰ while preserving a trial that will appear to be fair to those who will not settle. One alternative is the non-judicial mediator.¹⁴¹ In such programs, the settlement discussions occur with the assistance of an experienced private lawyer who is not permitted to report the substance of those discussions to the trial judge.¹⁴² Another alternative is for the settlement talks to be hosted by a judicial officer other than the trial judge. This person could be another trial judge¹⁴³ or the magistrate.¹⁴⁴ Either system, by taking the trial judge out of the settlement talks, preserves the appearance of fairness of the ultimate trial.¹⁴⁵ Such insulation of settlement from trial is not only desirable; it should be mandatory, out of respect for how the litigants will feel about the fairness of the process.

138. WILL ET AL., *supra* note 129, at 24 (remarks of Judge Merhige regarding how he attempts to find another judge to handle settlement conferences for his non-jury cases).

139. Longan, *Bureaucratic Justice*, *supra* note 123, at 738 n.124 (listing cases).

140. Approximately two-thirds of cases filed in federal court settle. See Longan, *Shot Clock*, *supra* note 6, at 682.

141. Longan, *Bureaucratic Justice*, *supra* note 123, at 725-33 (discussing "referral mediation").

142. *Id.*

143. This is the system employed by Judge Merhige. See *supra* note 137.

144. Longan, *Bureaucratic Justice*, *supra* note 123, at 739-45 (describing the strengths of magistrate mediation).

145. I have expressed elsewhere my strong preference for use of magistrates as settlement officers. *Id.* In addition to the positive effect on the appearance of fairness, using the magistrate as the mediator insulates the parties from possible manipulation by a private mediator or coercion by a trial judge. *Id.*

C. *Judicial Control of Trial Presentation*

A third way in which trial judges can undermine the appearance of fairness concerns the need to conduct trials efficiently. No one can doubt the need to control lawyers' tendencies to take too long in the presentation of evidence.¹⁴⁶ No one can doubt the need to conserve on the precious little trial time that is available in federal court for civil cases.¹⁴⁷ The appearance of fairness problem concerns the method chosen by the court to enforce the undoubted need to be efficient. There are two: judicial control of the format and content of evidence presented, and the provision of time limits within which the lawyers can choose their own format and content. The latter better serves the appearance of fairness by enabling the parties to remain autonomous in their presentations to the fact-finder.

1. Direct Judicial Control

Trial judges can and do assert direct control over both the method of presenting evidence and its content. The Federal Rules of Evidence state that "[t]he court shall exercise reasonable control over the mode . . . of interrogating witnesses and presenting evidence so as to . . . (2) avoid needless consumption of time. . . ."¹⁴⁸ Those rules also permit the court to exclude relevant evidence if its "probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."¹⁴⁹ The court thus can assert direct control over how evidence is presented and what relevant evidence is presented.

In controlling the mode of presenting evidence, the court can, for example, require parties to submit direct testimony in written, narrative form to conserve the time that otherwise would be used by the rehearsed question and answer format of traditional direct examination.¹⁵⁰ Such "testimony" has been used to shorten trials.¹⁵¹ The court can order the

146. Longan, *Shot Clock*, *supra* note 6, at 698-703 (discussing why trials inherently will last too long in the absence of judicial control of the volume of evidence).

147. *Id.* at 668-82 (discussing the shortage of time in federal court for civil trials).

148. FED. R. EVID. 611(a).

149. FED. R. EVID. 403.

150. See, e.g., Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73 (1983) (discussing Judge Richey's requirement of written testimony).

151. See, e.g., *Phonetele, Inc. v. AT&T*, 889 F.2d 224, 231-232 (9th Cir. 1989) (upholding use of written testimony as a means of shortening trials).

use of summarized deposition testimony rather than endure the tedious reading of an entire deposition.¹⁵² The court can also require evidence to be presented by edited videotape.¹⁵³ The court can terminate the examination of a witness simply because it is repetitive¹⁵⁴ or, in the court's view, takes too long.¹⁵⁵ The court's discretion on the method of presenting evidence is quite broad.¹⁵⁶

The court can also take an even more direct role by deciding to exclude relevant evidence under Rule 403.¹⁵⁷ Most of this effort is expended before trial. One court described the judge's role at the pretrial conference as to "scrutinize the witness list . . . with a beady eye and ruthlessly prune redundant or marginal evidence."¹⁵⁸ The pruning also happens at trial, as the court learns more about the case and sees vividly not only the probative value of the evidence but also endures the time it takes to present it.¹⁵⁹

Every time the court dictates the method of presentation, or forbids the introduction, of relevant evidence the court undermines the litigant's ability to control how his or her case will be presented. The judge, not the lawyer, is making the strategic decision about whether a written narrative will tell the story better than live testimony. The court, not the party's lawyer, is deciding how valuable a piece of admittedly relevant evidence is

152. *Oostendorp v. Khanna*, 937 F.2d 1177, 1179-80 (7th Cir. 1991) (upholding right of trial court to order use of summarized deposition testimony); *In Re Air Crash Disaster at Stapleton Int'l. Airport*, 720 F. Supp. 1493, 1503-1504 (D. Colo. 1989) (describing use of summarized written direct testimony and summarized deposition testimony as ways of saving time at trial).

153. *E.g.*, *Lucien v. McLennand*, 95 F.R.D. 525 (N.D. Ill. 1982).

154. *E.g.*, *Liner v. J.B. Talley and Co.*, 618 F.2d 327, 331 (5th Cir. 1980).

155. *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991); *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1203 (8th Cir. 1990).

156. CHARLES A. WRIGHT AND VICTOR J. GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6162 (1990) ("[B]ecause the combinations of facts that may have a bearing . . . is virtually limitless, the courts must have broad discretion to balance costs and benefits in light of the applicable facts.").

157. *See generally* Longan, *Shot Clock*, *supra* note 6, at 703-07 (discussing the advantages of time limits over Rule 403).

158. *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (Posner, J.).

159. *See, e.g.*, *Miles v. Olin Corp.*, 922 F.2d 1221, 1229 (5th Cir. 1991) (terminating cross-examination of expert witness because it had gone on so long, even though the questioner still had relevant impeachment to do); *see also* McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 928-29 (7th Cir. 1984) (excluding character evidence based upon its minimal probative value and the time it would take to hear it); *Stathos v. Bowden*, 728 F.2d 15, 19 (1st Cir. 1984) (evidence of what other firms were paying for jobs similar to plaintiffs' had too little probative value to be admitted in sex discrimination case); *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 305 (4th Cir. 1984) (court properly denied admission of other consumers' complaints about tampons).

and deciding whether time should be taken to hear it. The judge, not the lawyer, is deciding whether a particular point bears emphasis by some admittedly repetitive evidence.¹⁶⁰ The litigant is in an adversary system but is no longer autonomous. The court has become the "manager" of the trial rather than the umpire. The litigant has become less of a master of his or her own destiny. The litigant's perception of the fairness of that proceeding has been impaired.

2. Time Limits

There is an alternative that enables the court to be efficient in the use of trial time and yet not take away the litigants' autonomy. The court may impose time limits on the presentation of evidence under Federal Rule of Civil Procedure 16.¹⁶¹ With a time limit, the court is out of the business of micro-managing the trial for the parties. The parties are left to choose for themselves how best to spend their time. As the court in one case said, "in a protracted case such as this, the purpose of [Rule 403] can best be achieved by considering time in the aggregate and leaving to counsel the initial responsibility for making individualized selections as to the relative degree of probative value from the mass of evidence available."¹⁶²

The beauty of the time limit is that the goals of efficiency and the perception of fairness, which can often conflict, may coincide. The lawyers know the case better and thus are in a better position to assess what the best evidence and mode of presenting it may be. The court would have to devote enormous attention to the case to duplicate this knowledge.¹⁶³ That duplication is inefficient, and the time limit saves the court the trouble of involvement at that level of detail. Furthermore, and more importantly for present purposes, parties who are left autonomous on how to present their cases within a reasonable time will do so and keep the trial process efficient, while at the same time perceiving that they have received fairer trials than if the court had intervened to dictate the format or content of evidence. At least one lawyer has suffered contempt rather than succumb

160. See WRIGHT AND GOLD, *supra* note 156, at § 6164 (parties may introduce cumulative evidence as a strategy to emphasize a point).

161. FED. R. CIV. P. 16(c)(15) now lists as one of the topics for consideration at any pretrial conference the possibility of an order "establishing a reasonable limit on time allowed for presenting evidence." See generally Longan, *Shot Clock*, *supra* note 6.

162. SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13 (D. Conn. 1977).

163. See Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIG., Fall 1985, at 7 (discussing the investment of time necessary for court to assess probative value of evidence).

to a judge's order to present evidence in a particular mode.¹⁶⁴ Another court made the point most succinctly when it wrote of time limits that "the goal of preserving the court's resources is achieved while the traditional autonomy of counsel to present their own case, subject to the exigencies of that goal, is preserved."¹⁶⁵ The efficient trial in which the parties remain autonomous will be perceived as more fair.

V. CONCLUSION

The legitimacy of our system for resolving civil disputes depends ultimately on the perception of litigants and potential litigants that the system is fair. Parties with a dispute will hire lawyers to fight for them, rather than taking matters into their own hands perhaps, only if they perceive the process to be fair. This article has been an attempt to focus concern on ways in which recent developments in federal civil procedure undermine that perception of fairness and to propose specific ways to deal with those concerns. Even the efficient process that rarely errs on the merits will be illegitimate, and thus fail of its essential purpose, if the parties and potential parties do not believe in it.

164. *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 n.1 (9th Cir. 1979).

165. *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986).

